United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7180

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7180

TRAMP SHIPPING CO., INC.,
Plaintiff-Appellee,

—against—

GOTAAS LARSEN A.S., SANKO STEAMSHIP CO., LTD., PARABOLA SHIPPING UK LTD., HIMOFF MARITIME ENTERPRISES, LTD.,
Defendants-Appellees,

and

—against—

EMERALD SHIPPING CORP. (LIBERIA),
Defendant-Intervenor-Appellee,

and

—against—

MARDORF PEACH & CO. LTD.,
Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES, GOTAAS LARSEN A.S. AND EMERALD SHIPPING CORP. (LIBERIA)

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STATEMENT OF THE CASE

This is an appeal by defendant Mardorf Peach Ltd., one of six charterers or subcharterers of the vessel M/V AGIA ERINI II at the time the vessel went aground in October, 1974, from

two orders of the Honorable Henry F. Werker dated October 16, 1975 and March 9, 1976 directing Mardorf to participate in a consolidated arbitration with the vessel owner (plaintiff-appellee) and the other five charterers or subcharterers (defendants-appellees) to determine which charterer, if any, is liable for damages incurred as a result of the grounding.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court properly direct the parties to proceed to a consolidated arbitration in the interest of economy of time and expense and of consistency of result where the underlying dispute involved common issues of fact and law and no party would be prejudiced thereby.

2. Did the District Court have jurisdiction to order a party to participate in a consolidated arbitration where that party agreed to arbitrate disputes in New York, a proper demand for arbitration was made upon it and all of the parties were before the court in a proceeding to bring about a consolidated arbitration.

STATEMENT OF FACTS

A. THE UNDERLYING DISPUTE

On October 15 and 18, 1974, plaintiff Tramp Shipping Co., Inc.'s (hereinafter Tramp) vessel M/V AGIA ERINI II went aground at the port of Churchill, Manitoba, Canada prior and subsequent to loading a cargo of grain. Damages of some $2,700,000 were allegedly incurred.

At the time of the casualty each of the parties was a charterer or subcharterer of the vessel (except Tramp, which was registered owner) by virtue of a chain of contractual commitments. By charterparty dated December 18, 1969, with addenda, Tramp chartered the vessel to defendant Gotaas Larsen A.S. (hereinafter Gotaas) (Appendix 12a-18a). The

charterparty provided, as did each successive charterparty, for subletting the vessel (Appendix 12a, lines 16-17):

> "Charterers to have liberty to sublet the vessel for all or any part of the time covered by this Charter, but Charterers remaining responsible for the fulfillment of this Charterparty."

In this case, Gotaas subchartered the vessel to Emerald Shipping Corporation (hereinafter Emerald) (Appendix 35a), Emerald subchartered the vessel to Sanko Steamship Co. (hereinafter Sanko) (Appendix 36a-38a), and Sanko subchartered her to Parabola Shipping UK Ltd. (hereinafter Parabola) (Appendix 39a-40a). By oral charterparty with terms identical to the Sanko-Parabola charterparty, Parabola subchartered the AGIA ERINI II to Himoff Maritime Enterprises, Ltd. (hereinafter Himoff) (Appendix 153a-154a), and Himoff thereafter subchartered the vessel to Mardorf Peach Ltd. (hereinafter Mardorf) (Appendix 25a-27a).

Each charterparty was drafted on, or made reference to, the standard New York Produce Exchange form of time charter.

Clause 17, the arbitration clause, contained in each of the charterparties provides:

> "That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

Clause 6, the safe berth clause, common to each of the charterparties, provides:

> "That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that

> Charterers or their Agents may direct, provided the vessel can safely lie always afloat at any time of tide, except at such places where it is customary for similar size vessels to safely lie aground."

Clause 25, the ice clause, common to each of the charterparties, provides:

> "The vessel shall not be required to enter any ice-bound port, or any port where lights or lightships have been or are about to be withdrawn by reason of ice, or where there is risk that in the ordinary course of things the vessel will not be able on account of ice to safely enter the port or to get out after having completed loading or discharging."

While the Himoff-Mardorf charterparty does not contain language with respect to safe ports which is contained in the other charterparties, as shall be discussed below, consolidation does not require an identity of issues so long as the common issues of fact and law which do exist promote a saving of unnecessary cost or delay and no prejudice will result.

B. THE PROCEDURAL ASPECTS BELOW

On March 27, 1975, Tramp filed suit against the charterers and subcharterers herein alleging that the defendants acted "negligently and in breach of their warranties of safety of ports visited by their orders, *and in particular the warranties set forth in clauses 6 and 25*" of the charterparties by ordering the vessel to proceed to Churchill at that time of year to load a cargo of grain.

In its prayer for relief, Tramp requested, *inter alia*, that the Court order the parties to proceed to a consolidated arbitration of disputes.

Defendants Gotaas, Sanko, Parabola, Himoff, and intervening defendant Emerald, a subcharterer omitted from the complaint, each appeared and filed answers denying liability. Mardorf did not and has not filed an answer although it has

made procedural motions for dismissal, and has filed papers in opposition to consolidation.

On June 20, 1975, Tramp moved for an order pursuant to Title 9 U.S.C. §§ 4 and 5 and Rules 42(a) and 81(a)(3) of the Federal Rules of Civil Procedure, directing the parties to participate in a consolidated arbitration of all claims arising out of the voyage to Churchill (Appendix 45a). By memorandum decision and order dated August 4, 1975 Judge Werker granted the motion for consolidation, directed those parties who had not invoked the arbitration clause to do so and further directed Himoff to perfect jurisdiction over Mardorf (Appendix 64a-67a). All parties except Mardorf subsequently agreed to the consolidated arbitration rendering written demands unnecessary with respect to each other.

On August 7, 1975 Himoff served a demand for arbitration upon Mardorf (Appendix 132a).

Prior to service of the demand for arbitration, on May 28, 1975 Himoff served Mardorf with a copy of the complaint at its Canadian offices. On August 7, 1975, it also directed the Clerk of the United States District Court to serve upon Mardorf a copy of the summons and complaint, and its answer and cross-claim at Mardorf's head offices in London in accordance with Rule 4(i) Fed. R. Civ. P. This was accomplished on August 5, 1975 (Appendix 125a-127a). Receipt of these papers has never been denied by Mardorf, and by negative inference the Court found that Mardorf acknowledged receipt of process (Appendix 121a-122a, para. 5; 157a; 162a).

On July 29, 1975 prior to Judge Werker's decision, Mardorf moved to be dismissed from the suit for lack of personal jurisdiction, insufficient service of process and lack of service of process (Appendix 68a-70a).

This motion was denied by order dated August 15, 1975 (Appendix 117a). Mardorf's motion for rehearing, vacating the service by the Clerk and dismissal for lack of personal jurisdiction was denied by Judge Werker's memorandum decision

dated October 16, 1975. The Court also adhered to its earlier decision with respect to consolidation despite Mardorf's objections filed on September 5, 1975.

Not in issue on this appeal is Tramp's earlier appeal from so much of the decision dated August 4, 1975 specifying the make-up of the panel. By the District Court's order dated March 9, 1976, that portion of Judge Werker's decision concerning the composition of the panel was modified (Appendix 226a, 206a-208a) after which Tramp's appeal was voluntarily discontinued. It is the order of March 9, 1976 and the decision and order dated October 16, 1975 which are the subject of Mardorf's appeal.

SUMMARY OF ARGUMENT

Mardorf's appeal is directed to two broad issues, both concerned with the order directing it to proceed to consolidated arbitration.

Mardorf's first argument is that this dispute is not appropriate for consolidation because (1) there are breaks in the chain of contractual privity as a result of the oral Parabola-Himoff charterparty (Mardorf Brief, pp. 10-23) and the Himoff bankruptcy (Mardorf Brief, pp. 23-24), and (2) there are no common issues of law or fact which are required to invoke the procedure for consolidated arbitration (Mardorf Brief, pp. 14-15). As to privity, even if it were conceded that privity is necessary under Rule 42(a) Fed. R. Civ. P. for consolidation, which is denied, there are no breaks arising from the above circumstances. As to Mardorf's assertion that this dispute lacks the requisite common issues of law or fact necessary for consolidation under Rule 42(a), this disregards the common issues of fact resulting from the casualty having been suffered on a voyage to which all of the parties were involved. The common issues of law arise from alleged liability as a result of the warranties contained in the safe berth clause (Clause 6) and the ice clause (Clause 25) common to all of the charterparties. Identity of all issues is not a requirement for consoli-

dation, thus Mardorf's argument that by virtue of differences in wording of its charterparty it has a defense which other parties do not have is unavailing to defeat consolidation.

Mardorf's second argument is that since Tramp, not Himoff, moved pursuant to Title 9 U.S.C. §§ 4 and 5 for an order compelling consolidated arbitration, the motion was improper insofar as it concerned Mardorf. As a result, Mardorf concludes, the Court lacks *in personam* jurisdiction over it (Mardorf Brief, pp. 24-26). This exalts form over substance since the motion for arbitration, combined with a motion for consolidation, which the court recognized as a joint application by Himoff, avoided further needless motion practice before the Court.

ARGUMENT

POINT I

THE ORDER DIRECTING CONSOLIDATED ARBITRATION PURSUANT TO RULE 42(a) F.R.C.P. WAS PROPER

(1) THIS COURT HAS ENUMERATED A BROAD POLICY FAVORING CONSOLIDATION.

Rule 42(a) of the Federal Rules of Civil Procedure provides:

> "Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions, it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Within the parameters set out by the Rule, for purposes of convenience and economy in administration, consolidation is a matter of broad judicial discretion. Wright & Miller, *Federal Practice and Procedure: Civil* § 2383.

This Court's recent decision in *Compania Espanola De Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), concerned consolidation of arbitrations involving the owner (Nereus), charterer (HIDECA) and charterer's guarantor (CEPSA) under a contract of affreightment and guaranty. Nereus appealed from Judge Stewart's order directing consolidation on the grounds that the Court lacked authority to consolidate and that consolidation was improper unless the party in contractual privity with the other parties consented to consolidation. Setting out a broad policy favoring consolidation, the Court affirmed the order of consolidation stating:

> "There is more than ample support in the case law for the propriety of a court's consolidation of arbitrations under the federal statute. See, e.g., *Robinson v. Warner*, 370 F.Supp. 828 (D.R.I. 1974); *Lavino Shipping Co. v. Santa Cecila Co.*, 1972 A.M.C. 2454 (S.D.N.Y. 1972); *Matter of Arbitration between Chilean Nitrate Iodine Sales and Intermarine Corp.*, 1972 A.M.C. 2460 (S.D.N.Y. 1972). We agree that Fed. R. Civ. P. Rules 42(a) and 81(a)(3) are applicable. Moreover, we think the liberal purposes of the Federal Arbitration Act, *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), cert. granted, 362 U.S. 909, cert. dismissed pursuant to stipulation, 364 U.S. 801 (1960); *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 364-65 (1965); *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693 (2d Cir. 1965), *cert. denied*, 383 U.S. 909 (1966), clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases ..."

Mardorf either failed to recognize or misconstrued this broad policy favoring consolidation when it stated "this procedure [consolidation], if condoned, will extend the rather recent application of the Federal Rules of Civil Procedure to consoli-

dation of arbitrations." (Mardorf Brief, p. 13). Mardorf also incorrectly concluded that the procedural aspects of consolidation below resulted in proliferation of litigation involving parties which "ought not to be involved in the controversy." (Mardorf Brief, p. 13). Delay incurred in this suit has not resulted from efforts directed to consolidation, to which all parties but Mardorf have consented, but from Mardorf's efforts to avoid its commitment to participate in this arbitration.

(2) THIS DISPUTE INVOLVES COMMON QUESTIONS OF LAW OR FACT AND NO PARTY IS PREJUDICED BY CONSOLIDATION.

Consolidation of arbitrations, like consolidation of court actions, is governed by Rule 42(a) of the Federal Rules of Civil Procedure. *Compania Espanola De Petroleos, S.A. v. Nereus Shipping, S.A., supra.* The threshold question with respect to consolidation under Rule 42(a) is whether the controversy involves common issues of law or fact. We submit that Judge Werker properly concluded that this dispute involves such common issues.

At the time the vessel went aground at Churchill, all of the parties herein were contractually tied to the voyage, thus the issues of liability and damages are tied to identical facts. As to the common issues of law, the complaint specified a theory of liability based on breach of charterparty warranties set out in clauses 6 (the safe berth clause) and 25 (the ice clause) common to each of the charterparties. The common issues of law are whether any or all of the parties, including Mardorf, breached the safe berth and ice warranties by sending the vessel to Churchill.

Mardorf makes much of the difference in its charterparty owing to the specific reference to Churchill as the loading port (Mardorf Brief, pp. 14-15). Based upon this difference, it concludes that there are no common issues of law or fact. Mardorf is entitled to contend that the difference in language makes some sort of difference in respect of its liability, but that is a question for resolution by arbitrators. With respect to

consolidation it is sufficient to demonstrate that common issues of law or fact exist. It cannot reasonably be denied that such common questions do exist. It is not enough to defeat consolidation, as the cases demonstrate, that some issues in the consolidation proceeding will be different.

In *Stein, Hall & Co. v. Scindia Steam Nav. Co., Ltd.*, 264 F.Supp. 499 (S.D.N.Y. 1967) Judge Mansfield ordered consolidation of three actions against ocean carriers and the impleaded terminal operator for cargo damage arising out of the same flooding of the same pier. One of the ocean carriers, Java Pacific Line, much like Mardorf here, opposed consolidation on the ground that it was not involved in some of the issues which would be raised in the other suits and that its contract of carriage was different from that of the other carriers. The court rejected Java's argument and ordered a consolidated trial, stating (501):

> "Under all the circumstances, the substantial saving in time, effort and expense that would result from trial of the common questions of fact and law outweighs the slight hardship that might result to the defendant Java from being required to attend trial of some issues in which it is not involved. Since the trial will be non-jury, no prejudice could result to Java from any difference between its contracts and those of the other carriers involved."

In the instant case, consolidated arbitration will be before experienced commercial arbitrators who are certainly capable of evaluating the separate defenses raised by Mardorf. The competence of commercial arbitrators in this regard was discussed in *Insco Lines, Ltd.* v. *Cypromar Navigation Company, Ltd. and Seaboard Overseas Ltd.*, 1975 A.M.C. 2233 (S.D.N.Y. 1975), in which a consolidated arbitration was ordered among the voyage charterer, time charterer and shipowner involving a claim for cargo damage. The voyage charterer opposed consolidation on the ground that "there are some different issues of

law" with respect to the two disputes and that this variance of legal issues could "confuse" the panel. In distinguishing *Showa Shipping Co., Ltd. v. A/B Bellis*, also relied upon by Mardorf herein, the Court stated (pp. 2235-2236):

> "While there would clearly be considerable overlap of both legal and factual questions, it seems clear that different bases of liability and defenses thereto might be raised in the two proceedings. However, there does not appear to be such a diversity of issues that consolidation is unwarranted. See *Vigo S.S. Corp — Marship Corp. of Monrovia* (Arb), *1970 AMC 1377, 26 N.Y.2d 159, cert. denied*, 400 U.S. 819 [footnote omitted]. Unlike *Showa Shipping Co., Ltd. v. A/B Bellis*, 1972 AMC 2458 (S.D.N.Y. 1972), in which Judge Canella denied consolidation, this does not appear to be a case in which consolidation would result in necessity of widely different proofs for the various claims involved. Joining the two arbitrations should neither greatly expand the scope of the proceedings nor result in undue confusion of the issues to the prejudice of any party. The Court assumes that presumably competent commercial arbitrators would be able to segregate the issues properly in a consolidated arbitration."

In addition, *Showa Shipping, supra*, is factually distinguishable from the instant case in that it concerned an effort to consolidate arbitrations involving alleged misrepresentations in the fixture of two separate charterparties which, according to the court, would require proof of misrepresentation and materiality for each separate transaction, resulting in prejudice and confusion. The instant arbitration concerns the same facts common to all parties.

Similarly, in *Matter of Arbitration between Czarnikow-Riona Co. and Eddie Steamship Company, Ltd.*, 1975 A.M.C. 1116 (S.D.N.Y. 1975) Judge Brieant ordered, over the shipowner's objection, consolidated arbitration among the shipowner, charterer and receiver in a dispute involving damage to

the receiver's pier sustained during discharging operations. The Court noted that the claims derived from the same facts surrounding the docking and discharging of the vessel stating (¶119):

> "The mere fact that there are some issues which will not be common to both arbitrations and which will require the arbitrators to determine separately the issues of liability is not reason to avoid consolidation. On the contrary, Riona (the Charterer) would bear the risk of inconsistent findings of fact if the arbitrations proceed separately."

The instant case presents a clear situation for consolidating proceedings. Consolidation will diminish the time and expense of holding separate arbitrations since common witnesses, documents and other such evidence will be presented, and will eliminate the possibility of inconsistent results. There is no demonstration that because it may have a separate defense not available to the other parties Mardorf will be prejudicially affected by consolidation.

(3) THE CONTRACTUAL RELATIONSHIPS DO NOT ADVERSELY AFFECT THE POWER OF THE COURT TO ORDER CONSOLIDATION.

Mardorf alleges that there are two breaks in the "necessary chain of privity" for there to be a consolidated arbitration: the absence of a charter and an enforceable arbitration agreement between Himoff and Parabola and the bankruptcy of Himoff (Mardorf Brief, pp. 18-23). We submit that these assertions are factually erroneous or without legal precedent and that Mardorf lacks standing to assert them as defenses available to it. We discuss each seriatim.

(a) The Charterparty between Parabola and Himoff.

Himoff and Parabola asserted through their counsel at a hearing before Judge Werker on September 22, 1975 that there was between them an oral charterparty with terms identical to the charterparty between Parabola and Sanko (Appendix

153a-154a). An oral charterparty, as a maritime contract, is not subject to the statute of frauds and is a binding commitment. *Gardner v. The Calvert*, 253 F.2d 395 (3rd Cir. 1958), *cert. denied*, 356 U.S. 960.

However, even if there were not a charterparty between Himoff and Parabola *per se*, it is evident that some type of contract existed between them since the contractual commitment for the AGIA ERINI II passed from Sanko to Parabola then from Himoff to Mardorf. In some manner the commitment for the vessel had to pass from Parabola to Himoff. Although the terms of the contract between Parabola and Himoff may affect liability *inter se*, in no way do those terms affect the obligations of Mardorf to Himoff arising out of their contract of charterparty. Thus, whatever were the terms of the contract which passed interest in the vessel from Parabola to Himoff the contract at the very least continued the chain of obligations running from Tramp through Mardorf. No more should be necessary for purposes of consolidation.

(b) The Arbitration between Parabola and Himoff.

Mardorf is asserting as its own defense one available only to Parabola or Himoff — the enforceability of an oral arbitration agreement. This defense was never raised or asserted by either Parabola or Himoff. In fact, Parabola and Himoff *consented* to arbitrate, thus a petition to compel arbitration between them was unnecessary. It follows that the decision in *Garnac Grain Company v. Nimpex International, Inc.*, 249 F.Supp. 986 (S.D.N.Y. 1964), relied upon by Mardorf, is inapposite since that case concerned Garnac's efforts to compel Nimpex to arbitrate, over Nimpex's refusal, on the ground that there was no enforceable arbitration agreement. In the instant case, where Parabola and Himoff have consented to arbitrate, Mardorf has no standing to put forward as a defense to *its* participation in the consolidated arbitration (in which it does not deny the existence of an enforceable arbitration agreement

with Himoff) that two other parties to the consolidated arbitration do not have between them an enforceable arbitration agreement.

To the extent that Mardorf is urging that the absence of written arbitration agreements throughout the chain of contracts somehow affects the power of the court to order consolidation, it does not take into consideration the distinction between compelling and consolidating arbitrations. By consolidating the separate arbitrations, as the Court did below, it did not compel Parabola or Himoff to arbitrate nor did it compel any of the other parties, except Mardorf, to arbitrate. They had already agreed to arbitrate — the court in effect ordered that Mardorf be compelled to arbitrate with Himoff and that all existing arbitration proceedings be consolidated.

(c) The Himoff Bankruptcy.

Mardorf argues that the Himoff bankruptcy brings about a stay of arbitration. The answer to this argument is that the trustee, at a hearing before Judge Werker on February 23, 1976, specifically requested on behalf of Himoff that the arbitration proceed (Appendix 213a). The trustee clearly is vested with the power to do this pursuant to Bankruptcy Rule 610 which provides:

> "The trustee or receiver may, with or without court approval, prosecute or enter his appearance and defend any pending action or proceeding by or against the bankrupt, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal."

We submit that it was the trustee's duty, not simply his right, to participate in this proceeding, as he has agreed to do, since Himoff's claim for indemnity against Mardorf must be pursued to fully protect the interests of the estate.

Even if the trustee had not authorized the arbitration to proceed, there is no provision in the Bankruptcy Act for a stay under the circumstances presented.

The bankruptcy petition was filed against Himoff Maritime Enterprises, Ltd. on September 18, 1975. On that date, arbitration proceedings involving Himoff and arising out of the AGIA ERINI II casualty were pending. The suit below is, in substance, a prayer for arbitration of a particular sort. The Court below directed that a consolidated arbitration take place in its original decision of August 8, 1975.

Section 11(a) of the Bankruptcy Act, applicable to the Himoff bankruptcy proceeding, provides for a stay of "a *suit*" pending against a bankrupt.* Bankruptcy Rule 401(a), which supplements §11(a), provides that the filing of a petition operates as "a stay of the commencement or continuation of any *action* against the bankrupt . . ." An arbitration proceeding is neither a "suit" nor an "action."

The general rule is stated in *Collier on Bankruptcy* (14th ed., 1975) at pp. 1148-1159:

> "Rule 401(a) refers to 'actions' rather than 'suits'. The word 'suits' under § 11a was always given a broad meaning, hence, this change is not significant. Suits or actions include any legal proceedings where the personal liability of the bankrupt is sought to be fixed. Thus the term may embrace supplementary proceedings on a

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* Himoff's bankruptcy began as an involuntary petition under Chapters I-VII of the Act. Thereafter Himoff petitioned for an arrangement under Chapter XI. However the Chapter XI rules no longer apply because on January 8, 1976 Himoff was adjudicated a bankrupt. Section 378 of the Act, 11 U.S.C. § 778, concerning reinstatement of the bankruptcy proceeding subsequent to a Chapter XI proceeding, provides:

> "Upon the entry of an order directing that bankruptcy be proceeded with — (1) in the case of a petition filed under section 321 of this Act, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, *as if such petition under this chapter had not been filed;* . . ." (emphasis added)

> judgment, levy of execution, garnishment, or proceedings to arrest a bankrupt on civil process out of state court arising on a dischargeable claim. *The term, however, does not include arbitration proceedings,* or contempt proceedings arising out of disobedience of a state court order made prior to the stay, although the creditors themselves may be restrained from initiating or furthering contempt proceedings in order to collect a judgment." (emphasis added)

Collier cites with approval the decision of a Bankruptcy Referee in *Matter of the Markowitz Company, Inc.*, 6 Am. B.R. (N.S.) 221 (1925).

The Referee there stated:

> "It does not seem to me that the arbitration proceeding instituted before the bankruptcy between the bankrupt and one of its creditors is a suit within the language of the Bankruptcy Act."

And again:

> "As before stated, I do not think the arbitration proceeding is a suit within the language of the Bankruptcy Act. For that reason it does not seem to me that the arbitration proceeding should be restrained any more than the acts of an accountant who was examining the bankrupt's books could be restrained under this section." (pp. 222-3)

Under the circumstances, where the trustee has authorized the arbitration to proceed, or alternatively since a Section 11a bankruptcy stay does not apply to a pending arbitration, Mardorf has no standing or legal authority to raise a stay as a bar to this pending arbitration.

POINT II
THE DISTRICT COURT HAD JURISDICTION TO ORDER MARDORF TO PARTICIPATE IN A CONSOLIDATED ARBITRATION

Mardorf's purely technical objection to its participation in the arbitration seems to be that since Himoff was the only party aggrieved by Mardorf's failure to arbitrate, Tramp's motion to compel arbitration was not a proper proceeding under Section 4 of the Arbitration Act (9 U.S.C. § 4) to compel Mardorf to arbitrate. As a result, Mardorf contends that the cases relied on in the court below* for the proposition that an agreement to arbitrate in New York constitutes a consent to the jurisdiction of the New York Federal Court, are inapplicable. Mardorf argues that because Tramp, not Himoff, moved for the consolidated arbitration which all parties except Mardorf support, the District Court lacked *in personam* jurisdiction over it.

It must be inferred from Mardorf's argument that if Himoff, not Tramp, had moved for consolidated arbitration, Mardorf's objection to *in personam* jurisdiction could not have been raised. As Mardorf concedes, there is a demand for arbitration in Himoff's answer and crossclaim (Mardorf Brief, p. 26). Furthermore, Himoff demanded arbitration by letter to Mardorf (Appendix 132a).

By June 20, 1975, when Tramp moved for consolidated arbitration, all of the parties except Mardorf, had appeared and answered the complaint. All of the parties, except Mardorf, subsequently agreed to consolidated arbitration. By October 16, 1975, the date of Judge Werker's decision adhering to his original decision concerning consolidation, all of the parties had

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* *Farr & Co. v. Cia Intercontinental De Navegacion,* 144 F. Supp. 840 (S.D.N.Y. 1956) aff'd, 243 F.2d 342; *Reed and Martin, Inc. v. Westinghouse Electric Corp.,* 439 F.2d 1268 1276 (2d Cir. 1971); *Petrol Shipping Corp. v. Kingdom of Greece,* 360 F.2d 103 (2d Cir. 1966).

been served with process and had an opportunity to respond to the motion for consolidated arbitration.

Whether this Court finds that Himoff's pleadings and papers constituted a petition to compel arbitration, as Himoff's counsel urged (Appendix 155a), or that the Court below in the interest of judicial economy entertained its own motion to compel Mardorf to arbitrate (which finds support in the record — Appendix 103a), we submit that to remand this case for the sole purpose of having *Himoff* make formal motion to compel Mardorf to arbitrate would be meaningless, time consuming and expensive where alternative interpretations of the procedure followed below may be indulged which do not violate the liberal spirit of the Arbitration Act.

CONCLUSION

The Orders of the District Court should be affirmed. The Court had *in personam* jurisdiction over Mardorf and the requisites for consolidated arbitration were met.

Dated: September 15, 1976

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